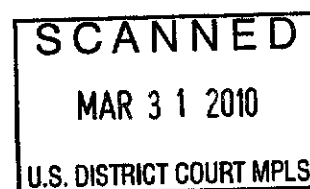


Attachment A



1 UNITED STATES DISTRICT COURT

2 DISTRICT OF MINNESOTA

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5 In re:) Civil 05-MD-1708 (DWF/AJB)
6)
7 GUIDANT CORPORATION) DISPOSITIVE MOTIONS
8 IMPLANTABLE DEFIBRILLATOR) HEARING
9 PRODUCTS LIABILITY)
10 LITIGATION,)
11)
12 -----

13)
14 This Document Relates)
15 To All Actions) 9:00 o'clock, a.m.
16) May 18, 2007
17) Minneapolis, Minnesota
18 -----

19
20 THE HONORABLE JUDGE DONOVAN W. FRANK
21 UNITED STATES DISTRICT COURT JUDGE
22 CIVIL MOTION PROCEEDINGS
23

24 * * *

25
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27 Registered Merit Reporter
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1 Which brings us to his senior citizen's
2 claims. Clearly, Mr. Duron chronologically qualifies
3 under either California or Minnesota, but the senior
4 citizen's claims are supplemental and derivative of his
5 freestanding consumer protection claims. And because
6 those claims fail, so do his senior citizen claims.

7 In addition, Your Honor, I think it is
8 important to emphasize that there is no evidence here
9 that would allow any reasonable jury or the Court to
10 find that Guidant committed unfair or deceptive acts
11 within the meaning of the Minnesota Statutes, within the
12 meaning of the CLRA in California, within the meaning of
13 the UCL in California. And I won't belabor these. I
14 think Mr. Pratt covered them admirably, but the key
15 facts are Guidant was aware of only one malfunction when
16 Mr. Duron's device was implanted.

17 At the time Mr. Duron's device was
18 implanted, Guidant didn't know the root cause of that
19 one malfunction. Guidant adequately warned Dr. Higgs,
20 Mr. Duron's physician, of the risk of random component
21 failure at the time, which is all they knew at that
22 time. Guidant never concealed the failure mechanism to
23 the FDA or anyone.

24 Mr. Duron never relied on anything Guidant
25 said or didn't say or represented in selecting his

1 there is a much greater weight of authority out there
2 from the Eighth Circuit and beyond, that if you apply it
3 to the facts here, you are going to conclude that there
4 is preemption of all of the claims we identify in the
5 brief.

6 And, you know, if this case isn't appropriate
7 for preemption, Your Honor, when you have an
8 extraordinarily rare event where the company brought it
9 to the attention of the FDA right along, and they are
10 arguing that you should have used a different design,
11 different manufacturing process, you should have warned
12 differently, I can't hardly think of a case in which
13 preemption wouldn't apply. So, we suggest to you that
14 preemption is appropriate in this case for all of the
15 claims we identify. We agree with them that a true
16 manufacturing defect claim -- in other words, we deny
17 that there is one in this case, but he agree that a
18 manufacturing defect claim is exempted out of the reach
19 of 360k. And we will probably quarrel with them over
20 what that means, but this motion would not address that
21 specific issue, Your Honor.

22 THE COURT: I'm not sure what I expect in
23 response. I will ask the same question of opposing
24 counsel on this; but, you know, listening to the
25 argument and going way back to the opening remarks this

1 morning, you know, how -- I suppose maybe it is called
2 good advocacy, but I don't think either one of you are
3 going to probably characterize it that way in a moment,
4 and you will mean it respectfully to the other side.
5 But, you describe the history of the lack of
6 concealment, the lack of being entirely forthright with
7 the FDA. That is quite different than the opening
8 remarks this morning of counsel where everything was
9 said short of a criminal conspiracy, in terms of not
10 being forthright with the FDA. You both can't be
11 correct.

12 MR. PRATT: Yeah, but -- well, I'm right.

13 THE COURT: And like I said, regardless of
14 how I look at that, that still makes Judge Rosenbaum's
15 decision an anomaly. But, you both described the
16 history entirely different.

17 I mean, I don't think it would be easy to
18 describe it as two sides to the same story, because I
19 mean, I have got I don't know how many documents in my
20 chambers, in my Clerks' chambers, but I don't think you
21 can just say, well, they are just two different versions
22 of the same events. But, how do I reconcile those?

23 MR. PRATT: I think that they are trying to
24 overcomplicate the issue, Your Honor. I think the issue
25 of whether we submitted every scrap of paper to the FDA